BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KHANH VAN VO	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 1,030,874
DOLD FOODS LLC	)	& 1,034,922
Self-Insured Respondent	)	

ORDER

Claimant appeals the August 18, 2008, Award of Administrative Law Judge John D. Clark (ALJ). Claimant was awarded compensation in the form of a 13 percent loss of use of his right upper extremity at the level of the shoulder, and a 13 percent loss of use of his left upper extremity at the level of the shoulder in Docket No. 1,030,874, for injuries suffered through January 2, 2006, claimant's last day worked before being taken off work by his authorized treating physician, J. Mark Melhorn, M.D. Claimant was also awarded a 5 percent functional disability to the whole body in Docket No. 1,034,922 for cervical injuries suffered through a series of injuries ending on September 8, 2007. Claimant was denied any permanent partial work disability in Docket No. 1,034,922 after the ALJ determined that claimant had been terminated "for cause".

Claimant appeared by his attorney, Joseph Seiwert of Wichita, Kansas. Respondent appeared by its attorney, Douglas D. Johnson of Wichita, Kansas.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the ALJ. At oral argument to the Board, the parties stipulated that the appropriate date of accident in Docket No. 1,030,874 is January 2, 2006, and the appropriate date of accident in Docket No. 1,034,922 is a series ending on September 8, 2007, claimant's last day worked with respondent. The parties further agreed that the base average weekly wage in Docket No. 1,034,922 is $501.17 as listed in the Award. Additionally, the parties agreed that the 5 percent whole body functional impairment awarded by the ALJ in Docket No. 1,043,922 is the appropriate functional rating in this matter. A dispute remains as to whether claimant is entitled to an additional award for a permanent partial general work disability (work disability) under K.S.A. 44-510e. The parties stipulated that the fringe benefits being provided claimant by respondent ended after September 8, 2007, and should be added to the average weekly wage in each

docket number as of that date. (Fringe benefits amounts: Docket No. 1,030,874 - $87.64; Docket No. 1,034,922 - $89.08.) Finally, the parties stipulated that the task loss opinion of Pedro A. Murati, M.D., of 40 percent is the only task loss opinion in this record and is appropriate if the Board determines that claimant is entitled to a work disability in Docket No. 1,034,922. The Board heard oral argument on December 3, 2008.

ISSUES

1. What is the nature and extent of claimant's functional impairment to each of claimant's upper extremities, at the level of the shoulder, in Docket No. 1,030,874? Claimant alleges entitlement to a 34 percent functional impairment to his left upper extremity at the level of the shoulder and a 24 percent functional impairment to his right upper extremity at the level of the shoulder pursuant to the opinion of Dr. Murati. Respondent contends the 13 percent functional impairment to each upper extremity at the level of the shoulder as awarded by the ALJ should be affirmed because it is based on the opinions of Dr. Melhorn and David W. Hufford, M.D., both of whom were treating physicians in this matter.

2. Did the ALJ properly calculate the award for the injuries in Docket No. 1,030,874? Respondent contends the ALJ used an incorrect wage in calculating the awards for claimant's upper extremities, arguing the ALJ included the value of the fringe benefits in the calculation for awards which would have paid out before the fringe benefits were discontinued.[1] However, the ALJ used a computation rate of $351.86 in calculating the award. Based on the agreed wage of $527.77 before the inclusion of fringe benefits, this would be the proper figure to be used in the calculation of the award in Docket No. 1,030,874.

3. Did the ALJ properly calculate the award for the injuries in Docket No. 1,034,922? Respondent contends the ALJ used an incorrect wage in calculating the award for claimant's alleged back injury, arguing the ALJ included the value of the fringe benefits in the calculation for an award where claimant was terminated from his job for refusing to do his job as ordered. Respondent contends claimant's lack of good faith in not retaining his job should work to deny the inclusion of the fringe benefits normally added to the average weekly

[1] K.S.A. 2005 Supp. 44-511.

wage when those benefits are no longer being provided pursuant to K.S.A. 2007 Supp. 44-511.

FINDINGS OF FACT

Claimant began working for respondent in 1995 as a "boner". Claimant would pull hams off a conveyer line and cut the meat off the bone. This job was a repetitive, hand-intensive job. In September 2005, claimant began having pain and numbness in his hands, and his fingers started locking up. Claimant reported these problems and was referred for medical treatment. After a period of conservative treatment proved unsatisfactory, claimant was referred to board certified orthopedic surgeon J. Mark Melhorn, M.D.

Dr. Melhorn first examined claimant on November 14, 2005. At that time, claimant provided a history of pain in his arms, with particular complaints in his fingers, with triggering and numbness. On January 3, 2006, Dr. Melhorn performed right carpal tunnel surgery. On February 2, 2006, he performed a right ring finger trigger finger surgery. And on March 14, 2006, Dr. Melhorn performed a left elbow surgery for lateral epicondylitis on the radial nerve in claimant's elbow. Claimant alleges that these surgeries provided no relief to his upper extremities. By March 28, 2006, claimant was released to return to work as tolerated and given a 5.5 percent impairment to the right forearm and a 5.5 percent impairment to the left arm. Both ratings were pursuant to the fourth edition of the AMA *Guides*.[2] Dr. Melhorn did not evaluate claimant's shoulders or neck.

Claimant testified that, along with the problems in his hands and arms, he also had problems in his shoulders. He was referred to board certified family practice and sports medicine specialist David W. Hufford, M.D., for an examination on March 14, 2007. This first examination was the result of a referral by the ALJ for an independent medical evaluation (IME). Dr. Hufford evaluated claimant's shoulders and cervical region, finding tenderness in claimant's cervical paraspinal muscles and in the thoracic paraspinal muscles. He diagnosed primarily myofascial pain in claimant's shoulders, which Dr. Hufford opined was related to claimant's work activities. Claimant was referred for several weeks of physical therapy, which provided no relief. Claimant reported a neck injury in May 2007. When Dr. Hufford evaluated claimant's neck, he found no trigger points or guarding. He felt there was no significant pathology attributable to claimant's neck.

On June 25, 2007, Dr. Hufford injected claimant's right shoulder in the subacromial space. Claimant experienced such increased pain that he was forced to go the

[2] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

emergency room. At the final examination on July 5, 2007, Dr. Hufford recommended permanent restrictions, limiting claimant's bilateral overhead reaching to no more than one-third of his work day. He rated claimant's shoulders at 8 percent to each upper extremity pursuant to the fourth edition of the AMA *Guides*.[3]

Claimant was referred by his attorney to board certified physical medicine and rehabilitation specialist Pedro A. Murati, M.D. Dr. Murati examined claimant on October 8, 2007, diagnosing trigger points in claimant's right shoulder girdle extending into the neck and thoracic paraspinal muscles. Claimant also had limited right lateral flexion with myofascial pain in the neck. Dr. Murati opined that claimant suffered a 5 percent whole person impairment of function for his neck complaints. He also evaluated the task list created by vocational expert Doug Lindahl. Dr. Murati determined that claimant had lost the ability to perform 4 of 10 tasks, for a 40 percent task loss. At his first deposition on February 20, 2008, Dr. Murati addressed only the neck and whole body ratings.

Dr. Murati was deposed a second time on April 17, 2008. At that time, he addressed claimant's upper extremity complaints, finding that claimant had suffered a 24 percent impairment to his right upper extremity and a 34 percent impairment to his left upper extremity, all pursuant to the fourth edition of the AMA *Guides*.[4] Dr. Murati opined that the injuries to claimant's upper extremities were incurred through September 2005 while claimant was working with respondent.

Dr. Melhorn was asked, at his deposition, to combine his upper extremity ratings with the shoulder ratings provided by Dr. Hufford. Dr. Melhorn testified the result was a 13 percent impairment to each upper extremity, combining the ratings with the aid of the fourth edition of the AMA *Guides*.[5]

Claimant was referred to board certified neurosurgeon Paul Stein, M.D., by respondent's insurance company for the evaluation and treatment of claimant's neck discomfort. X-rays indicated a small calcification of the C7 spinous process, which Dr. Stein felt was of no clinical significance. An MRI displayed a bit of straightening of the cervical spine, which Dr. Stein determined was probably positional. There was a cystic area just right of the C5-6 level. Dr. Stein noted that the radiologist thought this could represent a soft tissue injury and hematoma. Dr. Stein provided temporary restrictions that claimant should avoid repetitive bending and twisting of the neck. When Dr. Stein last saw claimant on August 9, 2007, he removed those temporary restrictions. Dr. Stein

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[3] AMA *Guides* (4th ed.).

[4] AMA *Guides* (4th ed.).

[5] AMA *Guides* (4th ed.).

determined that claimant had a 5 percent whole person impairment for the injuries to his neck, pursuant to the fourth edition of the AMA *Guides*.[6]

After claimant suffered the injuries to his upper extremities, he was moved off the boning line and moved to floor cleanup. This involved cleaning meat and trash from the floor. Claimant was picking up small pieces. Claimant was also placed under temporary work restrictions of no overhead reaching more than one-third of the time. The floor job involved almost no overhead work. By August 2007, those temporary neck restrictions were removed. Jon Boehlke, claimant's immediate supervisor, was aware of these restrictions and the light-duty job claimant had been returned to.

Claimant continued to work this light-duty job until September 8, 2007. On that date, a Saturday, claimant had been called to work as other employees had called in and respondent was short-handed. Claimant was asked to work the bacon side of the plant rather than the ham side. Claimant objected to this move. Mr. Boehlke testified that this job would be the same on either side. Claimant alleges the job was harder, arguing it was "too much work".[7] Claimant was advised that to refuse was insubordination and could result in a loss of job. An interpreter was brought in, and claimant was again advised of the ramifications of his continued refusal to work the bacon side. Claimant refused at least three times to work the bacon side and was sent home, after being told he was going to be suspended and his situation evaluated. The following Mon day, claimant was terminated by Aaron Peterson, respondent's human resources manager. At the time of claimant's termination, the only restriction claimant had was no overhead lifting. There was no overhead lifting involved in the clean-up job. Mr. Peterson acknowledged the job on the ham side required the same physical effort as on the bacon side. The scraps on the floor were the same. Mr. Peterson acknowledged that if claimant had gone home sick or called in sick, he would not have been fired. But there was no indication claimant alleged that he was ill. He just refused to do the job and wanted to go home. The ALJ determined that claimant's refusal to do the job on the bacon side constituted a lack of good faith on claimant's part and limited claimant to a functional whole body award of 5 percent to the neck pursuant to the ratings of Dr. Murati and Dr. Stein.

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[6] AMA *Guides* (4th ed.).

[7] Boehlke Depo. at 14.

PRINCIPLES OF LAW AND ANALYSIS

Docket No. 1,030,874

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[8]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[9]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[10]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[11]

K.S.A. 2005 Supp. 44-511(a)(2) states:

> (2) The term "additional compensation" shall include and mean only the following: (A) Gratuities in cash received by the employee from persons other than the employer for services rendered in the course of the employee's employment; (B) any cash bonuses paid by the employer within one year prior to the date of the accident, for which the average weekly value shall be determined by averaging all

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[8] K.S.A. 2005 Supp. 44-501 and K.S.A. 2005 Supp. 44-508(g).

[9] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[10] K.S.A. 2005 Supp. 44-501(a).

[11] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

> such bonuses over the period of time employed prior to the date of the accident, not to exceed 52 weeks; (C) board and lodging when furnished by the employer as part of the wages, which shall be valued at a maximum of $25 per week for board and lodging combined, unless the value has been fixed otherwise by the employer and employee prior to the date of the accident, or unless a higher weekly value is proved; (D) the average weekly cash value of remuneration for services in any medium other than cash where such remuneration is in lieu of money, which shall be valued in terms of the average weekly cost to the employer of such remuneration for the employee; and (E) employer-paid life insurance, health and accident insurance and employer contributions to pension and profit sharing plans. In no case shall additional compensation include any amounts of employer taxes paid by the employer under the old-age and survivors insurance system embodied in the federal social security system. Additional compensation shall not include the value of such remuneration until and unless such remuneration is discontinued. If such remuneration is discontinued subsequent to a computation of average gross weekly wages under this section, there shall be a recomputation to include such discontinued remuneration.[12]

Respondent argues that the ALJ erred in calculating the award in Docket No. 1,030,874 by including the value of claimant's fringe benefits in the award. However, as noted above, the ALJ's calculations utilized only the base and overtime wage excluding the fringe benefits when calculating the award as the award was fully paid before the fringe benefits were discontinued. Respondent's appeal of this issue is denied.

> Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.[13]
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> If the presumption of permanent total disability is rebutted with evidence that the claimant is capable of engaging in any type of substantial and gainful employment, the claimant's award must be calculated as a permanent partial disability.[14]

There has been no proof that claimant is permanently and totally disabled. Therefore, his award shall be determined based on K.S.A. 44-510d. Claimant's injuries suffered to his upper extremities are to be compensated as two scheduled injuries

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[12] K.S.A. 2005 Supp. 44-511(a)(2).

[13] K.S.A. 44-510e(a).

[14] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, *reh'g denied* (2007).

pursuant to *Casco.*[15] The ALJ in combining the ratings of Dr. Melhorn and Dr. Hufford awarded claimant a 13 percent impairment to each upper extremity. Both Dr. Melhorn and Dr. Hufford were treating physicians in this matter, having the opportunity to evaluate claimant on several occasions. Additionally, Dr. Hufford was originally a court appointed independent medical examiner, as was noted by the ALJ in the Award. Dr. Murati, on the other hand, was hired by claimant and had the opportunity to evaluate claimant on only one occasion. The advantage of being able to examine and evaluate a claimant on several occasions allows a physician to better determine the permanent results of an injury. The ALJ adopted the opinions of Dr. Melhorn and Dr. Hufford as the most persuasive, and the Board agrees. However, the award of a 13 percent impairment to each upper extremity at the level of the shoulder is modified to calculate each level of the extremity separately.

In *Casco*, the Kansas Supreme Court had occasion to consider the appropriate method in calculating bilateral injuries, an issue that up until that point, had been well settled. Until *Casco*, a bilateral injury that resulted in permanent impairment was computed as a whole body impairment. But the *Casco* Court concluded that the long-standing analysis was wrong. And from that point forward, the analysis for bilateral injuries was refocused. The *Casco* Court stated:

> Scheduled injuries are the general rule and nonscheduled injuries are the exception. K.S.A. 44-510d calculates the award based on a schedule of disabilities. If an injury is on the schedule, the amount of compensation is to be in accordance with K.S.A. 44-510d.
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> When the workers compensation claimant has a loss of both eyes, both hands, both arms, both feet, or both legs or any combination thereof, the calculation of the claimant's compensation begins with a determination of whether the claimant has suffered a permanent total disability. K.S.A. 44-510(c)(a)(2) establishes a rebuttable presumption in favor of permanent total disability when the claimant experiences a loss of both eyes, both hands, both arms, both fees, or both legs or any combination thereof. If the presumption is not rebutted, the claimant's compensation must be calculated as a permanent total disability in accordance with K.S.A. 44-510c.[16]

The majority of the Board has concluded that under the principles outlined in *Casco*, where a claimant suffers injuries that are scheduled, those injuries are to be computed separately. To do otherwise subverts the *Casco* analysis. The Court was quite clear in its meaning. "If *an injury* is on the schedule, the amount of compensation is to be in

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[15] *Id.*

[16] *Id.*

accordance with K.S.A. 44-510d."[17] There is no exception made for combining injuries, notwithstanding any contrary methodology included within the *Guides*.

Having determined that the ALJ's approach is consistent with *Casco*, all that needs to be done is to determine the relative impairments. The opinions of Dr. Melhorn and Dr. Hufford, that claimant has suffered a 5.5 percent impairment to each upper extremity at the level of the forearm and an 8 percent impairment to each upper extremity at the level of the shoulder, are adopted by the Board.

PRINCIPLES OF LAW AND ANALYSIS

Docket No. 1,034,922

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[18]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[19]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[20]

As noted above, the parties agree that the 5 percent whole body impairment is appropriate for claimant's neck injuries. That finding by the ALJ is affirmed.

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was

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[17] *Id.*

[18] K.S.A. 2007 Supp. 44-501 and K.S.A. 2007 Supp. 44-508(g).

[19] *In re Estate of Robinson*, *supra*.

[20] K.S.A. 2007 Supp. 44-501(a).

> earning at the time of the injury and the average weekly wage the worker is earning after the injury.[21]
>
> An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.[22]

In determining what, if any, wage loss claimant has suffered, the statute must be read in light of both *Foulk*[23] and *Copeland*.[24] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above quoted statute) by refusing an accommodated job that paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for the purposes of the wage-loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages, rather than the actual earnings, when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[25]

Claimant requests a work disability under K.S.A. 44-510e for the injuries suffered to his neck through his last day worked on September 8, 2007. Respondent objects to any award in excess of claimant's functional impairment of 5 percent to the whole body due to claimant's termination from respondent's job. Claimant was called in to work on Saturday, September 8, 2007, because several of respondent's other employees had called in sick. This left respondent short-handed on the bacon side of the plant. This was not the side claimant normally worked, as claimant was regularly assigned to work the ham side. When claimant was told that he would be working the bacon side of the plant, he objected, alleging that the work on the bacon side was more difficult. Claimant was told that his

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[21] K.S.A. 44-510e.

[22] K.S.A. 44-510e.

[23] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[24] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[25] *Id.* at 320.

objection and refusal would put his job in jeopardy. An interpreter was called in to explain to claimant that he was putting his job in jeopardy with the refusal, but claimant refused the reassignment at least three times. At that point, claimant was suspended and sent home. The next day, respondent's human resources director terminated claimant's employment. Both Jon Boehlke, claimant's supervisor, and Aaron Peterson, respondent's human resources manager, testified that the work on the bacon side was the same as on the ham side. The only restrictions claimant was working under were no overhead lifting. The clean-up jobs involved no overhead lifting. Based on claimant's refusal, he was terminated. Claimant also applied for unemployment and was denied same after it was determined that his termination stemmed from insubordination and was justified.

The Board finds claimant's refusal to work the bacon side of the plant was inappropriate. This loss of a job by claimant does not constitute a good faith effort to retain his job. Under *Copeland*, claimant has not shown a good faith effort and the wages claimant would have been paid with respondent will be imputed to claimant. Therefore, under K.S.A. 44-510e and *Foulk* and *Copeland*, claimant will be limited to his functional impairment of 5 percent. The award of the ALJ is affirmed.

CONCLUSIONS

Docket No. 1,030,874

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed. The opinions of Dr. Melhorn and Dr. Hufford are persuasive that claimant has suffered a 5.5 percent impairment to each upper extremity at the level of the forearm and an 8 percent impairment to each upper extremity at the level of the shoulder.

AWARD

Docket No. 1,030,874

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark dated August 18, 2008, should be, and is hereby, modified.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, and against the respondent, Dold Foods, LLC, a qualified self-insured, for an accidental injury which occurred through a series of accidents through January 2, 2006, and based upon an average weekly wage of $527.77.

Left Arm

For the left upper extremity injury, claimant is entitled to 11 weeks of permanent partial disability compensation, at the rate of $351.86 per week, in the amount of $3,870.46 for a 5.5 percent loss of use of the left forearm, and claimant is entitled to 18 weeks of permanent partial disability compensation, at the rate of $351.86 per week, in the amount of $6,333.48 for an 8 percent loss of use of the left shoulder.

Right Arm

For the right upper extremity injury, claimant is entitled to 11 weeks of permanent partial disability compensation, at the rate of $351.86 per week, in the amount of $3,870.46 for a 5.5 percent loss of use of the right forearm and claimant is entitled to 18 weeks of permanent partial disability compensation, at the rate of $351.86 per week, in the amount of $6,333.48 for an 8 percent loss of use of the right shoulder.

As of the date of this Order, the entire amount of these awards is due and owing and ordered paid in one lump sum less any amounts previously paid.

CONCLUSIONS

Docket No. 1,034,922

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed. Claimant failed to put forth a good faith effort to retain his employment with respondent when he refused to work the bacon side of the plant. This refusal violates the good faith requirements of *Foulk* and *Copeland* and, pursuant to K.S.A. 44-510e, limits claimant to an award based on his functional impairment.

AWARD

Docket No. 1,034,922

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark dated August 18, 2008, should be, and is hereby, affirmed.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, and against the respondent, Dold Foods, LLC, a qualified self-insured, for an accidental injury which occurred through a series of accidents through September 8, 2007, and based upon an average weekly wage of $590.25 ($501.17 plus $89.08 in fringe benefits effective September 9, 2007) for 20.75 weeks permanent partial general disability compensation at the rate of $393.52 per week for a total award of $8,165.54, for a 5 percent permanent partial general whole body disability.

As of the date of this Order, the entire amount of this award is due and owing and ordered paid in one lump sum less any amounts previously paid.

IT IS SO ORDERED.

Dated this ____ day of January, 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The undersigned respectfully dissents from the majority's decision with regard to the method of calculating the award. The majority's determination that *Casco* applies to this situation is the correct determination. But the majority then calculates each section of the

upper extremities separately. This is not contemplated nor required by *Casco.* In *Casco*, the Court only considered bilateral shoulder injuries. The injuries did not include separate parts of each upper extremity as is the case here. The majority, in providing ratings for each section of the upper extremities, contradicts the instructions contained in the AMA *Guides*. The AMA *Guides* instruct that when considering multiple parts of an extremity, the separate upper extremity impairments are to be determined for each part. Then, the upper extremity impairments are to be combined using the Combined Values Chart on p. 322 of the AMA *Guides*. (AMA *Guides*, sec. 3.1a, p. 3/15; sec. 3.1n, p. 3/65; sec. 3.1o, p. 3/66; sec. 3.1o, p. 3/72). The undersigned would determine the upper extremity impairments for each separate part as done by the majority, but, then, combine the upper extremity impairments as instructed in the AMA *Guides.*

This specific issue is a dispute originally raised between the various Board Members at the time of a prior appeal regarding how to properly compute impairments when dealing with multiple body part injuries in the extremities. This dispute will arise each time the Board is asked to consider extremity injuries when the claimant is not found to be permanently and totally disabled and when the claimant has more than one body part injured in one or more extremities. Thus, the issue must be decided not only in this case, but in every such case that arises and is appealed to the Board until such time as the appellate courts decide the issue. Therefore, this Board Member believes the consideration of the AMA *Guides*, as is required by K.S.A. 44-510d(a)(23), is germane to this dispute.

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BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
Douglas D. Johnson, Attorney for Respondent
John D. Clark, Administrative Law Judge